IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.6450 OF 2003

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRESIDENT, INDUSTRIAL COURT GUJARAT

Versus

RASIKBHAI PARSHOTAMDAS PATEL & ANR.

Appearance:

1. Special Civil Application No. 6450 of 2003

MR. J.B. PARDIWALA for Petitioner

MR. MUKUL SINHA for Respondent No. 1

MR. PRABHAKAR UPADYAY for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 22/04/2004 & 29/04/2004

ORAL JUDGEMENT

1. Rule.

Mr.Mukul Sinha, learned Counsel appearing for respondent No.1 waives service of Rule and Mr.Prabhakar

Upadyay, learned Counsel appearing for respondent No.2 waives service of Rule. With the consent of the parties, the matter is taken up for final hearing today.

2. The short facts of the case are that by the Labour and Employment Department, a Departmental Promotion Committee was constituted for promotion from Class-III to Class-II and Class-IV to Class-III employees. The Committee consists of President of the Industrial Court of Gujarat, Senior Member of the Industrial Court of Gujarat and the Chief Judge of the Labour Court, Ahmedabad. As per the petitioner, the meeting of the Committee was held on 23rd October, 2001 to consider the case of promotion from the post of cadre of clerk of the Court and as per the petitioner, the eligible persons were interviewed keeping in view the provisions of Rule 11 of the Gujarat Civil Services (Classification and Recruitment) General Rules, 1967 (hereinafter referred to as "the Rules"). It appears that respondent Nos.1 and 2 appeared at the interview and respondent No.2 was promoted to the post of Superintendent, Labour Court from the cadre of Clerk and as per the petitioner, respondent No.2 had secured more marks and, therefore, the promotion was given. It is the case of the petitioner that the procedure followed by the Committee was that each member of the Committee interviewed the candidates, who were appearing in the interview, and ten marks were allowed to every member and on the basis of total marks secured by the candidate concerned, the promotions were given. It is the further case of the petitioner that the proceedings of the Committee were common for filling up of four posts. It appears that so far as candidate Nos.1, 2, and 3, namely; Mr.A.M.Meer, Mr.D.J.Zala, Mr.M.I.Kapadia are concerned, there was no challenge, but for the promotion of Mr.Mirza, respondent no.2 herein, the challenge was made by respondent No.1 by preferring appeal before Gujarat Civil Services Tribunal, being Appeal No.380/2001. It appears that the Tribunal found that the Departmental Promotion Committee was supposed to consider the annual confidential reports of the eligible Government servants in assessing their merit and there is nothing on record to show that such an exercise was made by the Committee and the Tribunal further found that the Committee seems to have based its decision on the result of the oral interviews only, even though there is no provision to take oral interviews. Ultimately, the Tribunal also found that though four promotions were given under the impugned order, the appointment of respondent No.2 therein by the promotion, superseding the appellant, who is respondent No.1 herein, deserves to be quashed and set

aside and the order of appointment so far as it related to respondent No.2 herein as the Superintendent by promotion is quashed and it was further observed that respondent No.1 therein, who is petitioner herein, will be at liberty to fill up the posts keeping in view the observations made in the judgement of the Tribunal. The said decision of the Tribunal dated 28th October, 2002 is under challenge in this petition.

3. The learned Counsel appearing for the petitioner, Mr.J.B.Pardiwala mainly submitted that the finding of the Tribunal that the confidential reports are not considered is contrary to the record in as much as the Committee, before whom the matter was placed, had considered the confidential reports. He also submitted that as such there are no sub-rules for providing interviews, but, he submitted that with a view to assess the merits of the candidates concerned, the Promotion Committee was within its power to hold the interview. Mr.Pardiwala also submitted that as such respondent No.1 has acquiescence his rights by participation at the interview for the process of promotion, where he had lost or having been not selected for promotion, it is not open to the respondent No.1 to challenge the decision of the Committee.

4. Mr.Mukul Sinha, learned Counsel appearing for respondent No.1, has supported the order passed by the Tribunal, whereas Mr.Prabhakar Upadhyay, learned Counsel appearing for respondent No.2, has mainly adopted the contentions as they were sought to be canvassed on behalf of the petitioner through Mr.Pardiwala.

5. It would be necessary to consider the Rule itself providing for promotion and its scope and ambit. Rule 11, which is relevant for the purpose of the subject matter of the petition, reads as under:

"11. Appointment by promotion:- (i) Where an appointment to any post is to be made by promotion, no servant shall be entitled to such promotion on the ground of seniority. No such appointment shall be made unless in addition to seniority, the servant to be appointed is found to be fit for such promotion.

(2) In making an appointment to any post by promotion, the appointing authority may supersede a servant who is apparently not fit to discharge the duties and responsibilities of the post and whose appointment is likely to affect adversely

the efficiency or work assigned to that post."

6. If the Rule is read as it is, the construction appears to be that the criteria for promotion is on the basis of seniority-cum-fitness for such promotion. In this regard, if sub-rule (2) of Rule 11 is considered, it appears that the power is given to the appointing authority to supersede a servant, who is apparently not fit to discharge the duties and responsibilities of the post, and whose appointment is likely to affect adversely the efficiency or work assigned to that post. Therefore, if the conditions, as provided under sub-rule (2) are satisfied, it would be open for the appointing authority to supersede a Government servant even if otherwise he is senior in comparison to the persons next to him. Therefore, on conjoint reading of sub-rules (1) and (2) of Rule 11, it appears that the intention on the part of the Rule making authority is to give more weightage to the seniority and only in a given case, as provided under sub-rule (2), a candidate can be superseded. As observed earlier, supersessions are in two contingencies: (i) who is apparently not fit to discharge the duties and responsibilities of the post and (ii) whose appointment is likely to affect adversely the efficiency or work assigned to that post. Even for considering both the aspects, at the most, it can be said that the fitness of the candidate can be considered as per sub-rule (1), but, in a matter where a candidate is to be superseded, such person, who is sought to be superseded, must be apparently unfit to discharge duties and responsibilities of the post or whose appointment is likely to affect adversely the efficiency or work assigned to that post. It appears that the Departmental Promotion Committee has not at all undertaken the said exercise for the purpose of superseding respondent No.1, keeping in view sub-rule (2) of Rule 11 in mind.

7. Even if the matter is considered on the basis that the Departmental Promotion Committee was required to keep in view the provisions of sub-rule (1) of Rule 11, then, at the most, the criteria, as observed, earlier would be seniority-cum-fitness.

8. A reference may be made to the decision of the Apex Court in case of Union of India and Ors. v. Lt. General Rajendra Singh Kadyan and Anr., reported in A.I.R. 2000 S.C. 2513. The Apex Court had an occasion to consider the three criterion in the matter of promotion for hierarchy of Army namely; seniority-cum-fitness; seniority-cum-merit; and, merit-cum-suitability with due regard to seniority. The

Apex Court, at paragraph-12, has observed as under:

> 12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority-cum-fitness and seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them."
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> (emphasis supplied)

9. Therefore, it appears that while considering the basis of criteria as seniority-cum-merit, the exercise, which was required to be undertaken, was to reject the unfit, but, not to assess the comparative merit of candidates inter se. For the purpose of undertaking the exercise for considering a candidate as unfit, it appears that the relevant aspects would be the confidential reports of the candidate concerned for a reasonable period during which the candidate worked in the feeder post. Merely because the confidential reports were placed before the Committee at the time when the process of interview was undertaken, in my view, cannot be said to be a ground for meeting with the requirement of the Rule for undertaking the exercise of finding the candidate as unfit. As such, even if the original proceedings are considered, which is made available by Mr.Pardiwala to the Court during the course of hearing and as per Mr.Pardiwala, the same proceedings were made available to the Tribunal, it appears that there is no marking whatsoever in the column of the confidential reports nor any weightage is apparent from the record. On the contrary, the original proceedings, if considered, shows that the decision of the Committee is based on marking system and thereby, the marks secured by the candidate concerned at the interview. The record further shows that at the interview, respondent No.1 had secured 12 marks by the Members of the Committee, respondent No.2 had secured 14 marks by the Members of the Committee and

the said marking appears to be the basis for giving promotion qua respondent Nos.1 and 2. It appears that so far as the other three candidates, who also simultaneously came to be promoted at the impugned promotion process of the Committee, are concerned, possibly no grievance was brought to the notice of the Tribunal and also now before this Court, because even otherwise also they were senior to respondent No.1 and they were granted promotion and, therefore, the said aspect did not materially and substantially adversely affect the promotion qua those particular candidates. But, if the matter is examined keeping in view the process undertaken qua respondent Nos.1 and 2 herein, the consequential effect is that the Committee has made an attempt to assess comparative merit by undertaking the process of interview and as observed earlier, the performance at the interview is made as the basis for giving promotion. If the criteria of seniority subject to fitness is considered, the aforesaid exercise on the part of the Committee of assessing comparative merit of respondent Nos.1 and 2, that too by interview, cannot be sustained in view of the above referred decision of the Apex Court in the case of Union of India and Ors. v. Lt. General Rajendra Singh Kadyan and Anr., reported in A.I.R. 2000 S.C. 2513. When in the original proceedings no marking has been given on the basis of confidential report of the candidate concerned, in my view, it can be said that placement of the confidential report before the Committee or its consideration thereof would at the most be in furtherance to the step towards assessing comparative merit, which is not permissible as per the law laid down by the Apex Court in the above referred judgement.

(Since the Court time is over, S.O. to 29th April, 2004 for further dictation of the judgement.)

29/04/2004

10. Mr.Pardiwala has also relied upon a decision of this Court in the case of High Court of Gujarat vs. K.K.Parmar & Ors., reported at 1999(3) G.L.R. 2378, for contending that if the confidential reports are placed before the Selection Committee and if the marks are not given separately, the same would not vitiate the selection process. As such, even as per the petitioner, the principle adopted is for interview and the placement of confidential report is only said, but, no authenticated material is on record regarding any weightage given by the members of the Committee. Further in the case of High Court of Gujarat (supra), the criteria for promotion was "strictly considerations of

efficiency and proved merit" and, therefore, the Court observed that non-assignment of marks of past performance would not render the selection arbitrary. In the present case, the criteria, as per the rule, is the seniority, subject to fitness and, therefore, for finding out the fitness, in view of the aforesaid settled legal position, the only exercise, which was required to be undertaken, was to consider the confidential report and holding of the interview for assessing the comparative merit was not permissible and, therefore, in view of the present facts and circumstances of the case, the said decision would be of no help to the petitioner.

11. In view of the aforesaid, the contention of Mr.Pardiwala that the confidential remarks were considered and, therefore, there is an error on the part of the Tribunal in giving a finding to that extent, cannot be accepted.

12. The aforesaid takes me to examine the second contention that in absence of any special rule, permitting holding of the interview, with a view to assess the seniority cum merit of a candidate concerned, the Committee constituted for such purpose was within its power to set down the procedure for holding of the interview. Mr.Pardiwala, to support the said contention, has relied upon decisions of the Apex Court in the case of Sant Ram Sharma vs. State of Rajasthan & Ors., reported at A.I.R. 1967 S.C. 1910, and in the case of Nagpur Improvement Trust vs. Yadavlal Jagannath Kumbhare & Ors., reported at A.I.R. 1999 S.C. 3084. In view of rule-11 referred to hereinabove and its interpretation, as made hereinabove, in light of the decision of the Apex Court, when it was not open to the Committee to assess the inter se merit between the candidates, since the criteria was seniority subject to fitness, the exercise for holding of the interview was itself beyond the scope and ambit of the manner provided for promotion as per rule-11. As such, for examining the fitness of the candidate concerned, at the most, the weightage and appropriate weightage could have been given on the basis of the confidential remarks earned by the candidate concerned in the Confidential Report for a past reasonable period. Since the criteria is, subject to unfitness, if a candidate has been given any adverse remarks in the confidential report, then, possibly, he can be considered as unfit. As observed earlier, there is no authenticated material regarding any weightage given or considered by the Committee on the basis of the confidential report. In any event, when for the purpose of promotion, the procedure or the requirement was to

follow the provisions of rule-11 and the fitness was to be examined on the basis of the confidential report for a reasonable period of past years, at the most, the Committee could consider the extent of reasonable period, may be, of 5 years or otherwise in the feeder cadre, but, introduction of an independent procedure of assessing the comparative merit of the candidates by undertaking the process of interview, in my view, was neither permissible nor even could have been undertaken in purported exercise of power of the Committee. Therefore, in view of the express language of rule-11 and in view of the observations made by this Court interpreting rule-11 hereinabove, the contention of Mr.Pardiwala cannot be accepted to the extent that it was within the power of the Committee to formulate the procedure for holding of the interview for assessing the merit of the candidate concerned.

13. The last contention raised is that as such, the respondent no.1 has acquiescence his rights qua the selection process since he has participated at the interview process. In support of the said contention, Mr.Pardiwala relied upon a decisions of this Court in the matter between Vikramsinh Amarsinh vs. State of Gujarat & Ors., reported at 2003(2) G.L.H. 220, and in the matter between Madan Lal & Ors. vs. State of Jammu and Kashmir & Ors., reported at 1995 II L.L.N. 22. If the matter rests only on the question of equitable rights of the parties and not on the question of following the mandatory procedure, possibly the matter could have been examined differently. Something which is without following the mandatory procedure or without there being any authority under the law, cannot be allowed to be operated or would not be rendered legal merely because the challenge was not there at the relevant point of time. As observed earlier, the selection process qua respondent nos.1 and 2 herein is without following the mandatory procedure as per rule-11 read with interpretation thereof and once having found that the selection process was without following the mandatory procedure, I find that the petition cannot be thrown away on the ground that respondent no.2 had participated at the interview. Even otherwise also, there cannot be any bar or acquiescence to a right conferred by the statute. In the decision of Vikramsinh Amarsinh (supra), the Court found that the Selection Committee has made selection strictly in accordance with the provisions of law and after having satisfied about the merits of each candidate and having considered ability of each candidate, including the petitioner herein and, therefore, the observations were made that the unsuccessful candidate

cannot challenge the process of selection and further in the said case, the challenge was on the ground that the marks were not earmarked in an appropriate manner. Therefore, the said decision of Vikramsinh Amarsinh (supra) would be of no help to the petitioner.

14. In the case of Madan Lal & Ors. (supra), the Apex Court found that the process of selection, including the written test, viva voce, is not illegal and, therefore, the observations made by the Apex Court deserves to be considered in light of the facts of that case. Such is not the situation in the present case inasmuch as, as observed earlier by this Court, it is found by this Court also that the selection process undertaken by the Committee qua respondent nos.1 and 2 is vitiated on account of non-following of the mandatory procedure and, therefore, the said decision of the Apex Court in the case of Madan Lal & Ors. Ors. (supra) would be of no help to the petitioner.

15. In view of the aforesaid discussion, the petition fails so far as maintaining the selection qua respondent nos.1 and 2 is concerned. However, the Tribunal has quashed and set aside the appointment of respondent no.2 as the Superintendent by promotion, such will also be a consequence in view of the decision in this petition, but, so far as filling up of the post of the Superintendent is concerned, the President of the Industrial Court shall undertake the process for selection for giving promotion to the post of Superintendent, in light of the observations by this Court hereinabove and shall complete the same as early as possible, preferably within a period of three months from the receipt of the writ of this Court. With a view to see that there may not be any vacuum of the post of Superintendent in the Industrial Court and as by virtue of the interim order passed in this petition, the respondent no.2 has continued as the Superintendent, until the regular promotion is given to a candidate, who is found to be deserving promotion by the Selection Committee, the respondent no.2 shall continue as holding the charge for the post of Superintendent. It is clarified that such interim arrangement shall not create any right whatsoever in favour of respondent no.2 to continue or to stick to the post of Superintendent after the process of selection is completed.

16. The petition is disposed of accordingly subject to the aforesaid directions. Rule is discharged. Considering the facts and circumstances of the case, there shall be no orders as to costs.

(Jayant Patel, J.)
poduval/kamlesh